

HOUSE BILL NO. 206

INTRODUCED BY NOONAN

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO THE DESIGNATION AND OPERATION OF CONTROLLED GROUND WATER AREAS PROVIDED FOR UNDER THE WATER USE LAWS; CLARIFYING HOW GROUND WATER MAY BE APPROPRIATED IN CONTROLLED GROUND WATER AREAS; PROVIDING FOR AN ADDITIONAL 2 YEARS TO STUDY TEMPORARY CONTROLLED GROUND WATER AREAS; REQUIRING THAT GROUND WATER STUDIES ~~BE PAID FOR BY THE PETITIONERS~~ ARE UNDER DIRECTION AND CONTROL OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; AMENDING SECTIONS 85-2-113, 85-2-306, 85-2-322, 85-2-507, AND 85-2-508, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Definition.** As used in this part, "perennial flowing stream" means a stream that historically has flowed continuously during all seasons of the year, during dry as well as wet years.

Section 2. Section 85-2-113, MCA, is amended to read:

"85-2-113. Department powers and duties. (1) The department may prescribe fees or service charges for any public service rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates, for rulemaking hearings under 85-2-319, for administrative hearings conducted under this chapter, for investigations concerning permit revocation, for field verification of issued and completed permits, and for all change approvals. There may not be fees for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The department may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices, except that the department may not require a meter on a water well outside of a controlled ground water area or proposed controlled ground water area unless the maximum appropriation of the well is in excess of the limitation contained in 85-2-306(4);

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of wells to prevent the waste, contamination, or pollution of ground water.

(3) The department shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property.

(4) (a) The department shall adopt rules to require the owner or operator of an appropriation facility on a watercourse or portions of a watercourse identified as chronically dewatered by the department under 85-2-150 to acquire, install, and maintain a suitable controlling and measuring device no later than 2 years after designation of the watercourse or portions of the watercourse as chronically dewatered, except that when the department specifically finds that the installation of measuring devices along the entire watercourse or portions of the watercourse is not practicable within the 2-year deadline, it may establish a later deadline.

(b) For the purposes of subsection (4), an appropriation facility includes but is not limited to any method used to divert, impound, or withdraw water from a watercourse. Hydroelectric facilities that are using recognized methods of flow measurement, as determined by the department, are in compliance with subsection (4)."

Section 3. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1) Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works or, if another person has rights in the ground water development works, with the written consent of the person with those property rights. If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not

1 create an easement in or over the real property where the ground water development works are located.

2 (2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

3 (a) according to a permit received pursuant to 85-2-508; or

4 (b) according to the requirements of an order issued pursuant to 85-2-507.

5 (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before
6 appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons
7 a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source
8 from two or more wells or developed springs exceeding this limitation requires a permit.

9 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground
10 water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided
11 by the department through its offices.

12 (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a
13 certificate of water right, return a defective notice for correction or completion, together with the reasons for
14 returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and
15 refiled with the department within 30 days of notification of defects or within a further time as the department may
16 allow, not to exceed 6 months.

17 (iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation
18 is the date of refiled a correct and complete notice with the department.

19 (c) A certificate of water right may not be issued until a correct and complete notice has been filed with
20 the department, including proof of landowner notification as necessary under this subsection (1). The original
21 of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office
22 in Helena. The date of filing of the notice of completion is the date of priority of the right.

23 ~~(2)~~(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use
24 between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force
25 prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in
26 subsection ~~(4)~~ (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is
27 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing
28 of a notice, as provided in subsection ~~(4)~~ (3), or the date of the filing of the claim of existing water right.

29 (5) An appropriation under this subsection (4) is an existing right, and a permit is not required. However,
30 the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except

1 that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall
2 issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under
3 the adjudication proceedings provided for in 85-2-236.

4 ~~(3)~~(6) A permit is not required before constructing an impoundment or pit and appropriating water for
5 use by livestock if:

6 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet; ~~and~~

7 (b) the appropriation is less than 30 acre-feet a year; ~~and~~

8 (c) the appropriation is from a source other than a perennial flowing stream; and

9 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is
10 owned or under the control of the applicant and that is 40 acres or larger. ~~As used in this subsection, "perennial~~
11 ~~flowing stream" means a stream that historically has flowed continuously during all seasons of the year, during~~
12 ~~dry as well as wet years. However, within~~

13 (7) Within 60 days after constructing the an impoundment or pit, the appropriator shall apply for a permit
14 as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit,
15 the department shall ~~then~~ automatically issue a provisional permit. If the department determines after a hearing
16 that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require
17 the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions,
18 restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

19 ~~(4)~~(8) A person may also appropriate water without applying for or prior to receiving a permit under rules
20 adopted by the department under 85-2-113."

21
22 **Section 4.** Section 85-2-322, MCA, is amended to read:

23 **"85-2-322. Hearing -- order.** (1) The department shall conduct a hearing on the proposed suspension
24 or closure, or both. Notice of the hearing must be published at least once in each week for 3 successive weeks,
25 not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or
26 counties in which the source is located. The department shall serve by mail a copy of the notice and proposal
27 not less than 30 days before the hearing upon each person or public agency known from the examination of the
28 records of the department to be a claimant, appropriator, or permitholder of water in the source.

29 (2) The department may by order suspend action on and shall close the source and refuse to accept
30 a class of applications if it finds on the basis of the hearing that there is substantial evidence in support of the

1 allegations required by 85-2-321 to be contained in the proposal.

2 (3) As part of fulfilling the requirements of 2-4-623, the order must define the source and must state the
3 class of applications to which the suspension or closure, or both, applies.

4 (4) Upon adoption of the order, the department shall refuse to accept any application for a permit under
5 this part for the class of application for which closure is ordered under ~~this section and 85-2-321~~ and this section.
6 If the order suspends action on pending applications, the department shall notify the applicant that action on ~~his~~
7 the applicant's application is suspended.

8 (5) Upon notice under 85-2-307 of intent to combine the hearings under 85-2-309 with the hearings
9 under this section, the department may suspend action on pending applications of the class until the hearing is
10 conducted under this section and, as part of its final order, may grant, deny, or condition the applications under
11 85-2-306(3), 85-2-310, and 85-2-311 or continue the suspension under this section."

12
13 **Section 5.** Section 85-2-507, MCA, is amended to read:

14 **"85-2-507. Limiting withdrawals -- modification of order.** (1) At the time set for the hearing, the
15 department shall proceed to hear oral and written evidence relevant to the designation or modification of the
16 controlled ground water area presented by the bureau, the department, and any other interested party. A full
17 record must be kept of all evidence taken at the hearing. The procedure must secure a full, fair, and orderly
18 proceeding and permit all relevant evidence to be received. The common-law and statutory rules of evidence
19 apply only upon stipulation of all parties.

20 (2) After the conclusion of the hearing, the department shall make written findings and an order. The
21 department shall by order declare the area in question to be a controlled ground water area if the department
22 finds on the basis of the hearing that:

23 (a) the public health, safety, or welfare requires a corrective control to be adopted; and

24 (b) (i) there is a wasteful use of water from existing wells or undue interference with existing wells;

25 (ii) any proposed use or well will impair or substantially interfere with existing rights to appropriate
26 surface water or ground water by others; or

27 (iii) the facts alleged in the petition, as required by 85-2-506(2), are true.

28 (3) The order must define the boundary of the controlled ground water area and must indicate which
29 of the ground water aquifers located within the area in question are included within the controlled ground water
30 area. Any number of ground water aquifers ~~which that~~ wholly or partially overlie one another may be included

1 in the same controlled ground water area.

2 (4) The order may include but is not limited to the following corrective control provisions:

3 (a) a provision closing the controlled ground water area to further appropriation of ground water, in
4 which event the department shall refuse to accept any applications for beneficial water use permits to
5 appropriate ground water located within the controlled area;

6 (b) a provision determining a permissible total withdrawal of ground water in the controlled area by day,
7 month, or year and permitting the department to apportion the permissible total withdrawal among the
8 appropriators holding valid rights to the ground water in the controlled area in accordance with the relative dates
9 of priority of the rights;

10 (c) a provision according preference, without reference to relative priorities, to withdrawals of ground
11 water in the controlled area for domestic and livestock purposes first and then to withdrawals for other beneficial
12 purposes, including but not limited to agricultural, industrial, municipal (other than domestic), and recreational
13 purposes, in the order that the department considers advisable under the circumstances;

14 (d) a provision reducing the permissible withdrawal of ground water by any appropriator or well in the
15 controlled area;

16 (e) when two or more wells in the controlled area are used by the same appropriator, a provision
17 adjusting the total permissible withdrawal of ground water by the appropriator or a provision forbidding the use
18 of one or more of the wells;

19 (f) a provision requiring and specifying a system of rotation of use of ground water in the controlled area;

20 (g) provisions for well spacing requirements, well construction constraints, and prior department
21 approval before well drilling, UNLESS THE WELL IS REGULATED PURSUANT TO TITLE 82, CHAPTER 11;

22 ~~(g)~~(h) provisions making any additional requirements that are necessary to protect the public health,
23 safety, and welfare in accordance with the intent, purposes, and requirements of this part and the laws of the
24 state.

25 (5) (a) If at the conclusion of the hearing the department finds that sufficient facts are not available to
26 designate or modify a permanent controlled ground water area, the department may by order designate the area
27 in question to be a temporary controlled ground water area. The order may include the corrective control
28 provisions contained in subsection (4). A temporary controlled ground water area must be designated as such
29 for a period not to exceed 2 years from the date of the order designating the temporary controlled ground water
30 area. The department may, for sufficient cause, extend the time period for an additional ~~2~~ 4 years; The time

1 period for an extension must be in 2-year increments. The department shall find sufficient cause for each
2 extension. For each extension in time, and in this case, all ground water appropriators in the controlled ground
3 water area must be notified of the extension.

4 (b) During the 2-year period; and any extensions of the time period, the department shall commence
5 studies necessary to obtain the facts needed to assist in the designation or modification of a permanent
6 controlled ground water area must be commenced under the supervision and control of the department. The
7 petitioners are responsible for the costs of the study. Facts gathered during the study period must be presented
8 at a hearing prior to the designation or modification of a permanent controlled ground water area. All parties
9 appearing at the first hearing must be served notice of this hearing by mail at least 30 days prior to the date set
10 for the hearing. The service is complete upon deposit of the notice at the post office, postage prepaid, addressed
11 to each person on whom service is to be made. Mailing of the notice, when completed, is considered to be
12 sufficient notice of the hearing to all persons directly affected. The department shall file in its records proof of
13 service by its own affidavit. The hearing must be conducted by the department in the manner of the first hearing,
14 and the department shall make written findings of fact and conclusions of law and issue an order according to
15 the provisions set forth in subsections (1) through (4). In the event that the department does not complete the
16 necessary study in the 2-year period or extension of the period, the temporary controlled ground water area
17 designation will terminate at the end of the 2-year period or extension.

18 (6) The department may enforce the order and bring an action for an injunction in a district court of a
19 district in which all or part of the area affected is located, in addition to all other remedies.

20 (7) The order of the department must be published and mailed by the department in the manner and
21 for the length of time as prescribed by 85-2-506 for the publication and mailing of the notice of hearing, except
22 that a copy of the written findings and order of the department must be mailed instead of a copy of the proposal
23 and, except further, that a copy of the order, together with a copy of the written findings, must be mailed to each
24 petitioner at the petitioner's last-known address. The department shall file a copy of the order with the county
25 clerk of each county within which any part of the controlled ground water area lies, and the county clerk shall
26 record the order without fee. The department shall file in its records proof of service by its own affidavit of
27 service. Upon publication and mailing of the order as prescribed in this section, the order is final and conclusive
28 unless an appeal from the order is taken.

29 (8) The department may by order suspend, modify, or revoke any order made as provided in this section
30 upon the notice and in the manner that is reasonable under the circumstances. A copy of each suspension,

modification, or revocation must be served or filed and recorded as provided for orders in subsection (7).

(9) While a matter is pending, the department may restrict further development of the subarea."

Section 6. Section 85-2-508, MCA, is amended to read:

"85-2-508. Controlled ground water areas -- permits to appropriate. (1) A person may appropriate ground water in a controlled ground water area ~~only~~ by:

(a) applying for and receiving a permit from the department in accordance with part 3 of this chapter;

or

(b) following the requirements of an order issued pursuant to 85-2-507.

(2) The department may not grant a permit if the withdrawal would be beyond the capacity of the aquifer or aquifers in the ground water area to yield ground water within a reasonable or feasible pumping lift, (in the case of pumping developments), or within a reasonable or feasible reduction of pressure, (in the case of artesian developments)."

NEW SECTION. **Section 7. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to [section 1].

NEW SECTION. **Section 8. Effective date.** [This act] is effective on passage and approval.

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